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RESTITUTIONARY RIGHTS OF A VENDEE IN DEFAULT OF AN ORAL CONTRACT FOR THE SALE OF LAND

It is almost a universal rule that a plaintiff vendee in default of an oral contract to purchase realty cannot recover his down payment if the defendant vendor is himself innocent of any breach and is willing and able to convey.¹ The problem is not without some difficulty, however, for two fundamental and divergent legal policies are relevant to its analysis. To allow restitution to the defaulting buyer would permit him to terminate performance at his will and recover payments from a seller who has bargained for full performance. Yet, to deny restitution may be to bestow a windfall upon the seller, for the payments retained may be greater in value than his actual injury, thus imposing a penalty or forfeiture upon the buyer.²

The *Restatement of Restitution* provides that in order to be entitled to restitution the plaintiff must show that he has conferred a benefit upon the defendant, and that the retention of that benefit is unjust.³ Although the cases rarely use the *Restatement* vocabulary,⁴ for purposes of analysis it is believed that the problem should be discussed in terms of the unjustness of the defendant's retention of the down payment.⁵ There are situations where the seller's retention of the buyer's payment could be considered unjust; there are other situations where the seller's retention is wholly justifiable. This note will endeavor to distinguish these situations while discussing the rationale and application of the rule that disallows restitution. Special emphasis will be given to California law.

Substance of the Rule Denying Restitution

Effect of the Statute of Frauds

There is little uniformity in the wording of the Statute of Frauds in the various states.⁶ Some provide that "no action shall be brought"⁷ on oral contracts within their scope; others proclaim the

¹ 3 S. WILLISTON, *CONTRACTS* § 538, at 844 (3d ed. W. Jaeger 1960) [hereinafter cited as WILLISTON]; 2 A. CORBIN, *CONTRACTS* § 332, at 177 (1950) [hereinafter cited as CORBIN]; Annot., 169 A.L.R. 187 (1947).

² Cf. 5 S. WILLISTON & G. THOMPSON, *CONTRACTS* § 1473, at 4118 (Rev. ed. 1937).

³ RESTATEMENT OF RESTITUTION § 1 (1937).

⁴ For a case speaking in terms of an unjust retention, see *Laham v. Reimann*, 177 Ore. 193, 198, 160 P.2d 318, 320 (1945), where it is said: "In order for plaintiffs to prevail in this action, which is for money had and received, they must prove that defendant has received money which in equity and good conscience belongs to them." See also *Arjay Investment Co. v. Kohlmetz*, 9 Wis. 2d 535, 101 N.W.2d 700 (1960).

⁵ See Jeanblanc, *Restitution Under the Statute of Frauds: What Constitutes an Unjust Retention*, 48 MICH. L. REV. 923 (1950) [hereinafter cited as Jeanblanc].

⁶ 3 WILLISTON § 526. Section 526A of Williston's treatise contains a table indicating the wording of the Statute in some states.

⁷ E.g., MASS. GEN. LAWS ANN. ch. 259, § 1 (1959).

enumerated oral contracts "void"⁸ or "invalid."⁹ The wording of the Statute has sometimes been determinative of the defaulting buyer's right to restitution,¹⁰ notwithstanding the provision in the *Restatement of Contracts* that the wording of the Statute should not determine these rights.¹¹ Thus, in a few states where the Statute makes oral contracts within its scope "void," recovery is allowed by giving substantive effect to the Statute.¹² It is reasoned that a void contract is a complete nullity, and concluded that a null and void promise can furnish no consideration to the buyer.¹³ As stated by the Wisconsin Supreme Court:

The purchaser can derive no benefit from the supposed contract. Nothing passes to him by virtue of it; he obtains no interest in the land, and no promise or agreement on the part of the seller to convey him any; and he can never derive any advantage from what has transpired, except it be as a matter of favor on the seller's part.¹⁴

Since the law is said to imply a promise of repayment where money is paid without consideration so long as no rule of public policy or good morals is violated,¹⁵ recovery is allowed.

The great majority of courts refuse to give such substantive effect to the Statute.¹⁶ The contract, it is argued, is not illegal,¹⁷ there is no objection to complete performance,¹⁸ nor is there any lack of consideration despite the buyer's inability to enforce the seller's promise in an action on the contract.¹⁹ The Supreme Court of Maine

⁸ E.g., WIS. STATS. ANN. ch. 240, § 240.08 (1957).

⁹ E.g., CAL. CIV. CODE § 1624.

¹⁰ See generally Jeanblanc 933-46.

¹¹ RESTATEMENT OF CONTRACTS § 355, comment c (1932).

¹² Reedy v. Ebsen, 60 S.D. 1, 242 N.W. 592 (1932), *aff'd on rehearing*, 61 S.D. 54, 245 N.W. 908 (1932); Scott v. Bush, 26 Mich. 418 (1873); Fields v. Korn, 366 Mich. 108, 113 N.W.2d 860 (1962); Durkin v. Machesky, 177 Wis. 595, 188 N.W. 97 (1922); Arjay Investment Co. v. Kohlmetz, 9 Wis. 2d 535, 101 N.W.2d 700 (1960); Brown v. Pollard, 89 Va. 696, 17 S.E. 6 (1893); Nelson v. Shelby Mfg. & Improvement Co., 96 Ala. 515, 11 So. 695 (1892).

¹³ Reedy v. Ebsen, 60 S.D. 1, 6-7, 242 N.W. 592, 594 (1932); Brown v. Pollard, 89 Va. 696, 702, 17 S.E. 6, 8 (1893); Scott v. Bush, 26 Mich. 418, 420 (1873); Brandeis v. Neustadt, 13 Wis. 142, 155 (1860).

¹⁴ Brandeis v. Neustadt, 13 Wis. 142, 155 (1860). It seems, however, that this reasoning could also be used in jurisdictions where the contract is made "voidable" only, for no matter how the Statute is worded, the buyer cannot enforce the seller's promise. Professor Corbin has concluded that social policy considerations, rather than mere statutory interpretation, were the motivating factors for these decisions. 2 CORBIN § 334, at 183-84. See also 3 WILLISTON § 538, at 845 n.12.

¹⁵ Arjay Investment Co. v. Kohlmetz, 9 Wis. 2d 535, 538, 101 N.W.2d 700, 702 (1960); Durkin v. Machesky, 177 Wis. 595, 602, 188 N.W. 97, 100 (1922).

¹⁶ Grauel v. Rohe, 185 Md. 121, 124, 43 A.2d 201, 203 (1945). See also cases cited notes 17-19 *infra*. For a discussion of the difference between the jurisdictions which give substantive effect to the Statute and those that do not, see Reedy v. Ebsen, 60 S.D. 1, 242 N.W. 592 (1932).

¹⁷ Keystone Hardware Corp. v. Tague, 246 N.Y. 79, 83, 158 N.E. 27, 28 (1927); Lanham v. Reimann, 177 Ore. 193, 197, 160 P.2d 318, 319 (1945); Grauel v. Rohe, 185 Md. 121, 124, 43 A.2d 201, 204 (1945); Sennett v. Shehan, 27 Minn. 328, 329, 7 N.W. 266 (1880).

¹⁸ Cases cited note 17 *supra*.

¹⁹ Phelan v. Carey, 222 Minn. 1, 7-8, 23 N.W.2d 10, 14 (1946); Garbarino v. Union Sav. & Loan Ass'n, 107 Colo. 140, 147, 109 P.2d 638, 642 (1941); Day v. Wilson, 83 Ind. 463, 464 (1882); Mitchell v. McNab, 1 Ill. App. 297, 301 (1878).

has stated the proposition as follows:

[T]he contract, though within the statute of frauds, is not utterly void; and, notwithstanding it cannot be enforced at law, is morally binding, and for the purposes of justice and equity, may, in certain cases, be upheld.²⁰

It has been argued that to deny recovery to the defaulting buyer is to enforce the contract against him,²¹ for the cases that deny restitution allow the seller to introduce into evidence both the oral contract and the plaintiff's breach as a defense to the plaintiff's suit.²² This argument fails to recognize the true theory of the buyer's claim. He is not suing upon the contract which he has repudiated; he is suing for restitution on the ground that the seller is unjustly retaining a benefit conferred upon him by the buyer. The buyer seeks to prove that the seller's retention of the down payment is unjust. Therefore, the seller, by way of defense, must be allowed to disprove the claimed unjustness of his retention,²³ and the oral contract and the buyer's breach may best suit this purpose.²⁴ The plaintiff-in-default situation can be compared with the situation where an innocent buyer sues a seller in default for restitution following the seller's breach of an oral contract within the Statute of Frauds. In that situation recovery is almost universally allowed,²⁵ there being no suggestion that the contract is being enforced against the seller.²⁶ If evidence of the oral contract and the breach were inadmissible, recovery could be denied on the ground

²⁰ *Gammon v. Butler*, 48 Me. 344, 345 (1861).

²¹ *King v. Welcome*, 71 Mass. (5 Gray) 41 (1855). In *King*, a defaulting plaintiff brought suit in quantum meruit for the reasonable value of services he performed under an oral contract within the Statute of Frauds. The court held that the defendant could not set up the oral contract and the plaintiff's breach as a defense because that would be indirectly enforcing the contract against the plaintiff. Yet, in the same jurisdiction a few years earlier, recovery of a down payment was denied a defaulting vendee under an oral contract for the sale of land. *Coughlin v. Knowles*, 48 Mass. (7 Met.) 57 (1843). There is no rational basis upon which the two cases can be distinguished. See 2 CORBIN § 334, at 183-84 n.78; F. WOODWARD, QUASI CONTRACT § 98, at 155 n.2 (1913).

²² See e.g., *Roberts v. Roesch*, 306 Pa. 435, 159 A. 870 (1932); *Grael v. Rohe*, 185 Md. 121, 43 A.2d 201 (1945); 3 WILLISTON § 538, at 842.

²³ 2 CORBIN § 332, at 177; 3 WILLISTON § 538, at 843; *Jeanblanc* 934-38. See generally *Williams, Availability By Way of Defense Contracts Not Complying With the Statute of Frauds*, 50 L.Q. REV. 532 (1934).

²⁴ Woodward argued that the buyer may have repudiated only because he thought he could not receive complete performance from the seller because the contract did not conform to the requirements of the Statute of Frauds. He therefore suggested that the buyer should be allowed restitution if the seller refused an offer to reduce the contract to a writing. F. WOODWARD, QUASI CONTRACTS § 98, at 155-56 (1913). This suggestion was adopted in the RESTATEMENT OF CONTRACTS § 355(4) (1932).

²⁵ 2 CORBIN § 325, at 161-62, and cases cited therein.

²⁶ "An action for the purpose of recovering money paid on . . . an oral executory contract is an action for money had and received, and is in no sense an action either to enforce a contract for the sale of land or for damages for breach of contract and is not within the statute of frauds." *Woodruff v. Camp*, 101 Ga. App. 124, 125, 112 S.E.2d 831, 832 (1960); accord, *Mangione v. Braverman*, 234 Md. 357, 199 A.2d 225 (1964); *Sarber v. Harris*, 368 P.2d 93 (Okla. 1962).

that the plaintiff was a mere volunteer.²⁷ This would be an unsound result, and would be equally unsound where the plaintiff is in default. Injustices can be eliminated when it is recognized that to admit the evidence of the oral contract and the breach is not to enforce the contract against either party,²⁸ but merely tends to prove or disprove the ultimate question of whether or not the seller's retention of the buyer's payment is unjust.

The California courts, in denying recovery to the defaulting buyer, have refused to give substantive effect to the Statute of Frauds.²⁹ It has been urged³⁰ that the court adopt the theory established in those jurisdictions where oral contracts within the purview of the Statute are made "void,"³¹ that is, that the buyer has received no consideration for his payment. This argument has not prevailed. Although the California Statute makes oral contracts within its scope "invalid,"³² it has been held that these contracts are "voidable" only.³³ From this, the courts have concluded that the seller's promise is good consideration for the buyer's payment.³⁴

Effect of the Vendee's Default and the Seller's Innocence

Once it has been determined that the Statute of Frauds should be given no substantive effect, the courts have concerned themselves with the effect of the buyer's default. Recovery is denied in most instances on the ground that a party in default should not prevail against an innocent party.³⁵ This traditional view has been stated as follows:

The right in the vendee of land by verbal contract, to recover what money or other consideration he has paid, is clearly confined to those

²⁷ Jeanblanc 935; see RESTATEMENT OF RESTITUTION § 2 (1937).

²⁸ Grauel v. Rohe, 185 Md. 121, 125, 43 A.2d 201, 203 (1945); Roberts v. Roesch, 306 Pa. 435, 440, 159 A. 870, 871 (1932).

²⁹ Laffey v. Kaufman, 134 Cal. 391, 66 P. 471 (1901); Walbridge v. Richards, 212 Cal. 408, 298 P. 971 (1931); Thompson v. Schurman, 65 Cal. App. 2d 432, 150 P.2d 509 (1944).

³⁰ Thompson v. Schurman, 65 Cal. App. 2d 432, 438, 150 P.2d 509, 512 (1944).

³¹ Cases cited note 12 *supra*.

³² CAL. CIV. CODE § 1624.

³³ Harper v. Goldschmidt, 156 Cal. 245, 104 P. 451 (1909); Producer's Fruit Co. v. Goddard, 75 Cal. App. 737, 243 P. 686 (1925).

³⁴ Laffey v. Kaufman, 134 Cal. 391, 393, 66 P. 471 (1901); see Thompson v. Schurman, 65 Cal. App. 2d 432, 438, 150 P.2d 509, 512 (1944).

³⁵ "Under these circumstances, I think it would be quite monstrous if the plaintiff could recover, and I am glad to think that the authorities are all opposed to her claim." Mellor, J., in Thomas v. Brown, 1 Q.B.D. 714, 723 (1876); accord, Schweiter v. Halsey, 57 Wash. 2d 707, 359 P.2d 821 (1961); Bruni v. Andre, 339 Mass. 708, 162 N.E.2d 52 (1959); Burford v. Bridwell, 199 Okla. 245, 185 P.2d 216 (1947); Watkins v. Wells, 303 Ky. 728, 198 S.W.2d 662 (1946), *rev'd on other grounds*, 307 Ky. 449, 211 S.W.2d 410 (1948); Campbell v. Fair, 82 S.W.2d 1038 (Tex. Civ. App. 1935); Keystone Hardware Corp. v. Tague, 246 N.Y. 79, 158 N.E. 27 (1927); Purves v. Martin, 122 Me. 73, 118 A. 892 (1922); Sennett v. Shehan, 27 Minn. 328, 7 N.W. 266 (1880); Lingle v. Clemens, 17 Ind. 124 (1861); Crabtree v. Welles, 19 Ill. 55 (1855); Coughlin v. Knowles, 48 Mass. (7 Met.) 57 (1843); Lane v. Shackford, 5 N.H. 130 (1830); Abbott v. Draper, 4 Denio 51 (N.Y. 1830); Shaw v. Shaw, 6 Vt. 69 (1834).

cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed or offered to perform on his part.³⁶

Stating the question in terms of the restitutionary model, that is, whether or not the vendor is unjustly retaining a benefit conferred upon him by the vendee, it seems sound to conclude that the vendor's retention is not usually considered unjust if the vendee is in default and the vendor is not.³⁷

The California courts have accepted this rationale in denying recovery.³⁸ In the leading case of *Laffey v. Kaufman*,³⁹ the vendee paid \$500 down on an oral contract to purchase realty and subsequently demanded repayment. When the vendor refused to repay, the vendee brought suit. The court held that a demurrer to the complaint should have been sustained because the plaintiff had failed to allege faithful performance on his part and a breach by the vendor.⁴⁰ Judging from this case, one would be led to believe that a defaulting plaintiff in an unenforceable contract case could never recover his payment in California. The validity of this statement will be discussed in the conclusion of the note.⁴¹

Possible Imposition of a Forfeiture

If the buyer is denied relief merely because he is in default, it is clear that in some cases he may be subjected to a forfeiture; that is, the seller may be allowed to terminate the buyer's rights under the contract and retain the payments without regard to the amount of damage he has sustained. The possibility that a forfeiture may be imposed has been given little recognition in the unenforceable contract cases despite the growing body of authority⁴² granting re-

³⁶ C. BROWNE, A TREATISE ON THE STATUTE OF FRAUDS § 122, at 123-24 (2d ed. 1863).

³⁷ Jeanblanc 954. Sometimes it is difficult to tell who is in default. In *Lane v. Shackford*, 5 N.H. 130 (1830), plaintiff entered into an oral contract to purchase realty from defendant and made a down payment. Subsequently, the defendant mortgaged the premises to a third party giving the mortgagee the power to sell. The plaintiff, upon hearing of this, repudiated the contract and sued for restitution. Recovery was denied on the ground that the plaintiff could not put the vendor in default so long as the latter retained the right to redeem. *Id.* at 134.

³⁸ *Walbridge v. Richards*, 212 Cal. 408, 298 P. 971 (1931); *Laffey v. Kaufman*, 134 Cal. 391, 66 P. 471 (1901); *Thompson v. Schurman*, 65 Cal. App. 2d 432, 150 P.2d 509 (1944).

³⁹ 134 Cal. 391, 66 P. 471 (1901).

⁴⁰ *Id.* at 393, 66 P. at 471. To the same effect, see *Walbridge v. Richards*, 212 Cal. 408, 298 P. 971 (1931), where the court stated that the issue was "whether [or not] the plaintiff . . . is entitled to recover said sum without any showing on his part of a further compliance with said oral agreement and also without any showing by way of either pleading or proof that the defendants have on their part violated any of the terms of said agreement." *Id.* at 413, 298 P. at 973-74. See also *Leach v. Rowley*, 138 Cal. 709, 72 P. 403 (1903).

⁴¹ As will be discussed below, it is believed that under present California law a defaulting plaintiff under an oral contract within the Statute of Frauds can recover his down payment to the extent that to deny recovery would subject him to a forfeiture. See text accompanying notes 80-93 *infra*.

⁴² See e.g., *Freedman v. The Rector*, 37 Cal. 2d 16, 230 P.2d 629 (1951); *De Leon v. Aldrete*, 398 S.W.2d 160 (Tex. Civ. App. 1965). Cases are col-

lief against forfeitures in cases involving enforceable contracts.

Application of the Rule Denying Restitution

Where Vendor Waives Vendee's Breach

It is fundamental that once a party commits an anticipatory breach of contract by repudiation, the other party has two alternatives: he may either terminate the defaulting party's rights under the contract, or he may waive the breach and seek further performance.⁴³ The same alternatives are open to a vendor under an oral contract within the Statute of Frauds when the vendee repudiates after making a down payment.⁴⁴ In many cases, the vendor alleges not only that he was ready and willing to perform at the time the vendee repudiated, but that he still remains so.⁴⁵ That is to say, the vendor has waived the vendee's breach. It can be stated categorically that if the contract were written, the vendee could not recover his down payment in cases where the vendor had waived the breach, for to allow recovery would defeat the vendor's right to specific performance.⁴⁶ Professor Corbin has noted that the vendee should not be in any better position merely because the contract is unenforceable.⁴⁷

Recovery has traditionally been denied in this situation merely because the buyer is in default.⁴⁸ However, the present trend of allowing recovery where a forfeiture would otherwise result⁴⁹ indicates that the buyer's default cannot be the crucial factor in all jurisdictions. It must therefore be asked whether or not the vendee would be subjected to a forfeiture where the vendor waives the vendee's breach and seeks further performance. Merely stating this crucial question seems to answer it, for it is difficult to see how the vendee can claim imposition of a forfeiture when the vendor still wishes to perform.⁵⁰ The vendor is not seeking to retain the down payment

lected in Annot., 31 A.L.R.2d 8 (1953); see Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931).

⁴³ L. SIMPSON, *CONTRACTS* § 171 (2d ed. 1965). In fact the vendor does have another alternative: he may rescind the contract and restore to the vendee all payments made. *Id.* Judging from the volume of cases where the vendee seeks to recover his payments, it would seem that this alternative is rarely elected.

⁴⁴ Since the oral contract is perfectly valid until the Statute of Frauds is pleaded as a defense to a suit on the contract, it follows that the same rules concerning election of remedies followed in enforceable contract cases would apply. Cf. *Keystone Hardware Corp. v. Tague*, 246 N.Y. 79, 158 N.E. 27 (1927); *Laffey v. Kaufman*, 136 Cal. 391, 66 P. 471 (1901).

⁴⁵ *Campbell v. Fair*, 82 S.W.2d 1038 (Tex. Civ. App. 1935); *Keystone Hardware Corp. v. Tague*, 246 N.Y. 79, 158 N.E. 27 (1927); *Cook v. Griffith*, 76 W. Va. 799, 86 S.E. 879 (1915); *Laffey v. Kaufman*, 136 Cal. 391, 66 P. 471 (1901); *Gammon v. Butler*, 48 Me. 344 (1861); *Coughlin v. Knowles*, 48 Mass. (7 Met.) 57 (1843).

⁴⁶ Corbin, *supra* note 42, at 1016-18.

⁴⁷ 2 CORBIN § 332, at 180. See also 3 WILLISTON § 538, at 842-43.

⁴⁸ See text accompanying notes 35-41 *supra*.

⁴⁹ See authorities cited note 42 *supra*.

⁵⁰ Cf. Corbin, *supra* note 42, at 1016-18; Annot., 31 A.L.R.2d 8, 10 (1953). While these authorities deal with enforceable contracts, it is believed that the

and the land as well. Quite the contrary; he still wishes to convey the realty, and states that he will do so upon tender of the balance of the purchase price. Allowing the vendor to retain the down payment under these circumstances is not unjust, but an injustice would result if the vendee were allowed to recover.⁵¹ If the contract had been enforceable, recovery would have been refused in order not to destroy the vendor's right to specific performance.⁵² Admittedly, the vendor in the oral contract situation has no right to specific performance, but this does not mean that he should not be afforded every opportunity to have the performance for which he bargained. Denying recovery to the defaulting buyer encourages performance, for one is more likely to carry out his promise once told that recovery of his down payment will be disallowed. Thus, a denial of recovery to the defaulting buyer in cases where the vendor waives the breach can be justified even in those jurisdictions which grant relief against forfeitures, not because the complaining party is in default, but because there is simply no forfeiture against which to grant relief.

Where Vendor Terminates Vendee's Rights

When the buyer repudiates the contract and demands the return of the money he has paid, the seller need not waive the breach; he may immediately terminate the buyer's rights under the contract.⁵³ Cases involving this situation deserve separate consideration, for here the seller's retention of the buyer's payments could be considered unjust.

In the North Carolina case of *Durham Consolidated Land & Improvement Co. v. Guthrie*,⁵⁴ a vendee sought recovery of his down payment after defaulting on an oral contract to purchase realty. After the vendee's repudiation the vendor sold the property to a third party. It was held that the subsequent sale did not alter the vendee's rights, and recovery was denied.⁵⁵ Similarly, in the Arkansas case of *Sturgis v. Meadors*,⁵⁶ a vendor brought suit on a check given by the buyer as part payment under an oral contract to purchase realty. The buyer breached by stopping payment on the check 2 or 3 days after entering into the contract, but on the date set for completion

principles stated therein can be applied to unenforceable contracts as well. See text accompanying notes 61-67 *infra*.

⁵¹ Such an unjust result has been reached in those cases where the vendee is allowed to recover because the Statute of Frauds uses the term "void" notwithstanding the vendor's willingness to continue the contract. Examples are: *Reedy v. Ebsen*, 60 S.D. 1, 242 N.W. 592 (1932), *aff'd on rehearing*, 61 S.D. 54, 245 N.W. 908 (1932); *Brown v. Pollard*, 89 Va. 696, 17 S.E. 6 (1893). Prior to the case of *Stuesser v. Ebel*, 19 Wis. 2d 591, 120 N.W.2d 679 (1963), the Wisconsin vendor could not even retain his expenses when the vendee sued to recover the down payment. Note, 1964 Wis. L. Rev. 167.

⁵² *Corbin*, *supra* note 42, at 1018 n.7; cf. *Goldsworthy v. Dobbins*, 110 Cal. App. 2d 802, 243 P.2d 883 (1952).

⁵³ L. SIMPSON, *CONTRACTS* § 171 (2d ed. 1965).

⁵⁴ 116 N.C. 381, 21 S.E. 952 (1895).

⁵⁵ *Id.* at 385, 21 S.E. at 954.

⁵⁶ 223 Ark. 359, 266 S.W.2d 81 (1954), *noted in* 1955 WASH. L.Q. 203, *and* 12 WASH. & LEE L. REV. 124 (1955).

of performance by both parties, the seller lacked good title to convey. The court nevertheless held for the seller, pointing out that once the buyer had repudiated, the seller was not required to do a futile act in perfecting his title.⁵⁷ *Durham* and *Sturgis*, in effect, held that the vendor may terminate the buyer's rights under the contract upon the latter's repudiation and retain both the land and the money without recourse by the vendee.⁵⁸

It should be recognized that in terms of a possible forfeiture, the situation where the seller terminates the buyer's rights differs radically from the case where the seller waives the buyer's breach. In the latter situation, as was noted above,⁵⁹ recovery should be denied because the seller should be given every opportunity to receive the performance for which he bargained. However, where the vendor terminates the vendee's rights it is clear that he has given up all thoughts of further performance and seeks to retain the down payment as forfeited. In jurisdictions that grant relief against forfeitures, this situation should be distinguished from the waiver situation and the court should ascertain whether or not the down payment exceeds the damage sustained by the vendor due to the breach.⁶⁰ If it is found that the seller has suffered less injury than the amount of the buyer's payment, retention of the excess should be considered unjust and recovery thereof allowed.

Analogy to the Enforceable Contract Situation

In an article dealing with the defaulting buyer's restitutionary rights where the contract is enforceable,⁶¹ Professor Corbin has pointed out that recovery should be allowed unless: (1) the vendor has not rescinded and remains ready and willing to perform, and still has the right to specific performance;⁶² or (2) the vendee cannot

⁵⁷ 223 Ark. at 363, 266 S.W.2d at 83.

⁵⁸ *Accord*, *Rosenberg v. Dietrick*, 37 F. Supp. 700 (D. Mass. 1940); *Lauer v. Raker*, 128 Ind. App. 264, 146 N.E.2d 116 (1957); *Knight v. Carter*, 1 Misc. 2d 351, 146 N.Y.S.2d 129 (Sup. Ct. 1955); *Bernstein v. Rosenzweig*, 1 N.J. Super. 48, 62 A.2d 147 (Super. Ct. 1948) (dictum). It is interesting to note how flexible the term "ready and willing to perform" is. While it should refer to the readiness of the vendor to perform at the time of trial, indicating his waiver of the vendee's breach, it has been permitted to refer to the date set by the parties for performance. *Triplett v. Knight*, 309 Ky. 349, 217 S.W.2d 802 (1949); *Watkins v. Wells*, 303 Ky. 728, 198 S.W.2d 662 (1946), *rev'd on other grounds*, 307 Ky. 449, 211 S.W.2d 410 (1948). This position results in allowing the vendor to retain the payments even though he has terminated the vendee's rights and is no longer "ready and willing to perform."

⁵⁹ Text accompanying notes 48-52 *supra*.

⁶⁰ "What is the correct measure of damages in a case of this kind? Shall we apply the rule of compensatory damages, or is it a case in which punitive damages should be allowed?" *Malmberg v. Baugh*, 62 Utah 331, 340, 218 P. 975, 978 (1923) (enforceable contract).

⁶¹ Corbin, *supra* note 42.

⁶² Since neither party has the right to specific performance when the contract is oral and within the Statute of Frauds, this statement could be construed to imply that Professor Corbin would allow restitution to the defaulting vendee regardless of whether the vendor waived the vendee's breach, or terminated his rights under the contract. Such construction is not warranted, however, for Corbin has stated in his treatise that a defaulting buyer

show that his installments exceed the damage caused to the seller by the repudiation; or (3) there is an express liquidated damages provision which can be upheld as such and which is not merely a forfeiture or penalty provision.⁶³ Thus, where the contract is enforceable, Corbin has distinguished between cases where the vendor has waived the breach and cases where he has terminated the vendee's rights. It is submitted that these considerations are also pertinent to cases involving unenforceable contracts. The single element that distinguishes the oral contract apart from the written one is, of course, the Statute of Frauds which merely provides that the contract cannot be enforced against either party. But, as has already been pointed out,⁶⁴ the buyer's suit is not upon the contract which he has repudiated, but is based on a claim for restitution of the unjustly retained benefits conferred upon the seller. The nature of the buyer's suit is the same as where the contract is written,⁶⁵ and the restitutionary remedy afforded in the written contract cases is in no way predicated upon the fact that the contract is enforceable. Indeed, the contract as to the defaulting plaintiff is no longer enforceable, for once he has repudiated he loses his right to sue upon it;⁶⁶ yet, he is nevertheless allowed restitution. Legal scholars have therefore concluded⁶⁷ that the quasi-contractual rights of a defaulting vendee in the unenforceable contract situation should be the same as if the contract were written and enforceable.

Recognition of a Possible Forfeiture

The fact that the vendee may be subjected to a forfeiture if the seller is allowed to keep the payments without regard to his injury

in an unenforceable contract case should have the same rights as if the contract had been written. 2 CORBIN § 332, at 180.

⁶³ Few unenforceable contract cases have been found where there was an express provision that the seller should retain all of the buyer's payments should the buyer default. There was such a provision in *Lanham v. Reimann*, 177 Ore. 193, 160 P.2d 318 (1945). In absence of an express liquidated damages provision, it has been said that "the obvious intent of the parties to the contract is that all payments made by the purchaser are to be treated simply and only as payments on the purchase price." *De Leon v. Aldrete*, 398 S.W.2d 160, 164 (Tex. Civ. App. 1965) (enforceable contract).

⁶⁴ Text accompanying notes 21-28 *supra*.

⁶⁵ See *Branche v. Hetzel*, 241 Cal. App. 2d 801, 51 Cal. Rptr. 188 (1966); *Freedman v. The Rector*, 37 Cal. 2d 16, 230 P.2d 629 (1951).

⁶⁶ See *Honey v. Henry's Franchise Leasing Corp.*, 64 Cal. 2d 801, 415 P.2d 833, 52 Cal. Rptr. 18 (1966); *Freedman v. The Rector*, 37 Cal. 2d 16, 230 P.2d 629 (1951); RESTATEMENT OF CONTRACTS § 280 (1932). But see *Ward v. Union Bond & Trust Co.*, 243 F.2d 476 (9th Cir. 1957) (applying California law). In *Ward* the vendee was allowed specific performance of a contract for the sale of land even though he had willfully breached the contract and had his rights under it terminated by the vendor. This was apparently disapproved in *Honey v. Henry's Franchise Leasing Corp.*, *supra*, where the court said: "When a vendee has materially breached his contract, the vendor has an election to rescind or to enforce the contract [citations omitted]. The defaulting vendee, however, has no such election. Otherwise, the contract of sale would in effect be a lease with an option to purchase." 64 Cal. 2d at 804, 415 P.2d at 835, 52 Cal. Rptr. at 20.

⁶⁷ 3 WILLISTON § 538, at 842-43, 2 CORBIN § 332, at 180; RESTATEMENT OF CONTRACTS § 355 (1932). See also *Dysart v. Remington Rand, Inc.*, 32 F. Supp. 477 (D. Conn. 1940).

has not gone unnoticed in all jurisdictions.⁶⁸ There was at one time some indication that the Wisconsin court would decide the problem using the forfeiture approach. In *Schwartz v. Syver*⁶⁹ a defaulting vendee sued to recover a down payment made under a contract for the sale of land. It was alleged that the memorandum covering the sale did not meet the formal requirements of the Statute of Frauds. Although the court held that the Statute's formalities were satisfied,⁷⁰ it went on to say by dictum that in cases where there was no writing the vendee could recover that portion of the payments which exceeded the damage sustained by the seller due to the breach,⁷¹ thus recognizing that a forfeiture might occur and should be relieved against in unenforceable contract cases. This theory, however, was directly contrary to an earlier line of Wisconsin cases,⁷² which allowed the defaulting vendee to recover on the theory that the oral contract was a complete nullity due to the use of the word "void" in the Wisconsin Statute of Frauds.⁷³ In *Stuesser v. Ebel*⁷⁴ the court returned to the earlier approach and the dictum in the *Schwartz* case was expressly overruled. The rationale of the *Schwartz* case, while perhaps unacceptable in jurisdictions which give substantive effect to the Statute of Frauds, such as Wisconsin, should be followed where the Statute is not given substantive effect.

The Idaho Supreme Court has accepted the forfeiture approach.⁷⁵ In *Raff v. Baird*,⁷⁶ the plaintiff orally contracted to purchase realty from the defendant, and in lieu of a cash down payment, furnished labor and materials for construction on the land that was to be purchased. The plaintiff buyer subsequently repudiated and the defendant sold the land to a third party for the same price that he would have received had the oral contract with the plaintiff been performed. In reversing the trial court's decision which nonsuited the buyer, the court stated:

The question of forfeiture is not . . . the question whether a vendee by his own default can confer upon himself a cause of action for the return of money paid, 'the other party being ready and willing to perform his part of the contract,' but whether on default by the vendee occurring the vendor may by abandoning all idea of performance . . . become entitled to retain not only the land but also the money paid, without regard to the damages or want of damages sustained from the breach⁷⁷

The court recognized the analogy between the unenforceable and enforceable contract situations, supporting their decision by reference

⁶⁸ *Raff v. Baird*, 76 Idaho 422, 283 P.2d 927 (1955); *Schwartz v. Syver*, 264 Wis. 526, 59 N.W.2d 489 (1953) (dictum).

⁶⁹ 264 Wis. 526, 59 N.W.2d 489 (1953).

⁷⁰ *Id.* at 528-29, 59 N.W.2d at 491.

⁷¹ *Id.* at 531-33, 59 N.W.2d at 492-93.

⁷² *Durkin v. Machesky*, 177 Wis. 595, 188 N.W. 97 (1922); *Brandeis v. Neustadt*, 13 Wis. 142 (1860).

⁷³ See discussion of this theory in text accompanying notes 10-15 *supra*. See also Note, 1964 Wis. L. Rev. 167.

⁷⁴ 19 Wis. 2d 591, 120 N.W.2d 679 (1963), noted in 1964 Wis. L. Rev. 167.

⁷⁵ *Raff v. Baird*, 76 Idaho 422, 283 P.2d 927 (1955).

⁷⁶ 76 Idaho 422, 283 P.2d 927 (1955).

⁷⁷ *Id.* at 427, 283 P.2d at 930. The court was quoting from Annot., 31 A.L.R.2d 8, 9-10 (1953).

to a case⁷⁸ dealing with an enforceable contract. It is believed that the *Raff* case reached the equitable and logical result and should be followed.⁷⁹

California

California is among the jurisdictions that grant restitution to a defaulting buyer in the enforceable contract situation to the extent that a denial of relief would impose a forfeiture upon the buyer.⁸⁰ In *Freedman v. The Rector, Wardens & Vestrymen of St. Matthias Parish of Los Angeles*,⁸¹ the California Supreme Court had before it a willfully defaulting vendee under a written contract to purchase realty. The vendee had paid \$2,000 down before he repudiated the contract. Following this repudiation the vendor terminated the vendee's rights under the contract and sold to a third party for a greater price than he would have received had the contract with the plaintiff been performed. In allowing restitution, the court discussed several provisions of the California Civil Code.

Section 3275⁸² of the Civil Code provides that if a party incurs a forfeiture by reason of his breach, relief against such forfeiture should be granted so long as the defendant's breach is neither grossly negligent, willful nor fraudulent. Since the vendee's breach in the *Freedman* case was found to be willful,⁸³ section 3275 was inapplicable. The court, however, found an alternative basis for recovery. It reasoned that to allow the vendor to terminate the vendee's rights under the contract and retain all the buyer's payments without regard to the damage occasioned by the breach would be an imposition of punitive damages on the buyer in a case arising out of contract,⁸⁴ a result in contravention of section 3294⁸⁵ of the Civil Code.

⁷⁸ *Graves v. Cupic*, 75 Idaho 451, 272 P.2d 1020 (1954).

⁷⁹ In *Lewis v. Peterson*, 127 Mont. 474, 267 P.2d 127 (1954), recovery was allowed to a defaulting vendee under an oral contract to purchase realty, but that case is unique. It was found that at the time of entering into the oral contract, the plaintiff was suffering from severe mental strain. He had not only just seen his wife burn to death, he also had been struck by lightning, hit by an 8,000 gallon gas tank (which also smashed his combine), lost 25 head of cattle in a storm and had "got hailed out." He was subsequently declared a mental incompetent. Holding that he had set forth facts which appealed to the conscience of a court of equity, recovery of the down payment was allowed, less damage sustained by the vendor. *Id.* at 478-79, 267 P.2d at 129.

⁸⁰ *Freedman v. The Rector*, 37 Cal. 2d 16, 230 P.2d 629 (1951).

⁸¹ *Id.*

⁸² "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

⁸³ 37 Cal. 2d at 20, 230 P.2d at 631.

⁸⁴ *Id.* at 21, 230 P.2d at 632.

⁸⁵ "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Further, section 3369(1)⁸⁶ of the Civil Code prohibits the court from granting specific relief where a forfeiture would be imposed. Thus, the California courts have held that a seller cannot bring a suit to quiet title without offering to restore to the buyer any payments in excess of the seller's damage.⁸⁷ If relief was to be denied when the buyer brought suit, the right to restitution would depend on whether it was the seller or the buyer who brought suit, an anomalous result which the *Freedman* court refused to accept.⁸⁸ *Freedman* therefore allowed a willfully defaulting buyer restitution of his payments to the extent that a forfeiture would have been imposed had recovery been denied.

The rationale of the *Freedman* case is equally applicable where the contract is oral.⁸⁹ The language in the statutes relied on by the *Freedman* court in no way eliminates unenforceable contracts from their scope, and the forfeiture is just as real whether the contract is written or oral. It can therefore be concluded that if, in an unenforceable contract case, the defaulting buyer's breach is neither grossly negligent, willful nor fraudulent, relief against forfeiture could be granted by virtue of section 3275 of the Civil Code; if the breach is such that relief under section 3275 cannot be granted, the principles of the *Freedman* case should control.

There have been no California cases subsequent to *Freedman* directly on the point⁹⁰ of the defaulting buyer's restitutionary rights under an unenforceable contract for the sale of land. As has already been pointed out,⁹¹ the California courts have repeatedly refused to

⁸⁶ "Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition."

⁸⁷ *Behrendt v. Abraham*, 64 Cal. 2d 182, 410 P.2d 828, 49 Cal. Rptr. 292 (1966); *Baffa v. Johnson*, 35 Cal. 2d 36, 216 P.2d 13 (1950); *Barkis v. Scott*, 34 Cal. 2d 116, 208 P.2d 367 (1949).

⁸⁸ 37 Cal. 2d at 22, 230 P.2d at 632-33.

⁸⁹ *Accord*, *Raff v. Baird*, 76 Idaho 422, 283 P.2d 927 (1955), where the Idaho court relied on a case involving forfeiture in an enforceable contract case to support relief against forfeiture in an unenforceable contract case.

⁹⁰ There has been some strong and misleading dicta, however. In *Noel v. Dumont Builders, Inc.*, 178 Cal. App. 2d 691, 3 Cal. Rptr. 22 (1960), the court quoted with complete approval the statement in *Laffey v. Kaufman*, 136 Cal. 391, 66 P. 471 (1901), that before a plaintiff can recover his down payment, he must show at least a tender of performance on his part and a breach by the defendant. The *Noel* case did not present an issue of forfeiture, but the language referred to is misleading, for it implies that the defaulting plaintiff can, in no case, recover his payments.

In *Maddox v. Rainoldi*, 163 Cal. App. 2d 384, 329 P.2d 599 (1958), the plaintiff sought a decree that the defendant held property on an oral trust for the plaintiff. Alternatively, he asked reimbursement for improvements made on the property to which the defendant raised the statute of limitations as a defense. It was held that no cause of action accrued until the oral trust was breached. The court added: "It seems logical to hold that *until the repudiation of the oral promise, or its breach in some other fashion*, the law imposes no such implied promise to repay. Such is the rule in the case of actions to recover money paid the vendor under oral contracts to convey real property." *Id.* at 392, 329 P.2d at 604-05 (emphasis added); *accord*, *Rooney v. Sullivan*, 169 Cal. App. 2d 432, 434-35, 337 P.2d 543, 544 (1959).

⁹¹ See text accompanying notes 38-41 *supra*.

allow any recovery to the defaulting buyer,⁹² but this was based on the law prior to *Freedman* that automatically denied a defaulting party recovery against a party innocent of any breach.⁹³ The *Freedman* case will make it incumbent upon the court to restate the rule when the proper case arises, for, due to the stated policy against forfeitures, no longer is the fact that the plaintiff is in default determinative of his right to restitution in California.

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⁹² *Laffey v. Kaufman*, 134 Cal. 391, 66 P. 471 (1901); *Walbridge v. Richards*, 212 Cal. 408, 298 P. 971 (1931); *Thompson v. Schurman*, 65 Cal. App. 2d 432, 150 P.2d 509 (1944).

⁹³ *Laffey v. Kaufman*, 134 Cal. 391, 393, 66 P. 471 (1901); *Walbridge v. Richards*, 212 Cal. 408, 414, 298 P. 971, 974 (1931); *Thompson v. Schurman*, 65 Cal. App. 2d 432, 438, 150 P.2d 509, 512 (1944). However, the result in these cases cannot be challenged because the vendor in each instance had alleged that he was still ready and willing to perform at the time of trial. Thus, no question of forfeiture was involved. See text accompanying notes 43-53 *supra*.

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